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6 JUAN M. VARGAS and HILDA  
7 VARGAS,  
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10 No. C 12-02008 WHA  
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12 Plaintiffs,  
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14 v.  
15 WELL'S FARGO BANK, N.A., and  
16 CALWESTERN RECONVEYANCE  
17 CORPORATION, a California  
18 Corporation,  
19

Defendants.  
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21 **ORDER GRANTING IN PART  
22 AND DENYING IN PART  
23 PLAINTIFFS' MOTION FOR  
24 LEAVE TO AMEND AND  
25 SETTING BRIEFING SCHEDULE**

26 **INTRODUCTION**

27 In this mortgage-loan dispute, plaintiffs move for leave to file an amended complaint. For  
28 the reasons stated below, the motion is **GRANTED IN PART** and **DENIED IN PART**. The hearing  
scheduled for September 20, 2012 is **VACATED**.

29 **STATEMENT**

30 The instant action arises out of plaintiffs Juan Manuel Vargas and Hilda Vargas' mortgage  
31 loan agreement and subsequent loan modification agreement with defendants. The prior factual  
32 background has already been discussed in the order granting defendants' motion to dismiss (Dkt.  
33 No. 34). Background necessary for the instant motion for leave to amend is described below.

34 Plaintiffs, who are represented by counsel, originally filed this action against defendants  
35 in San Mateo County Superior Court on March 19, 2012 (Case No. CIV512578). Plaintiffs'

1 original complaint alleged claims for violation of Section 17200 of the California Business and  
2 Professions Code, Section 4973 of the California Financial Code, Sections 2923.5, 1632, and  
3 1632.5 of the California Civil Code, common law fraud, negligence, and a claim for injunctive  
4 and declaratory relief. Defendant Wells Fargo Bank, N.A. then removed the action and moved to  
5 dismiss the complaint as barred by the statute of limitations and for failure to plead each claim  
6 with sufficient specificity. Defendant also argued that certain claims failed as a matter of law.  
7 Defendant's motion to dismiss all claims was granted in part by the dismissal order. That order  
8 held: (1) plaintiffs' Section 17200 claim was not time-barred, but plaintiffs failed to plead with  
9 sufficient specificity; (2) plaintiffs' claim under California Financial Code Section 4973 was  
10 time-barred; (3) plaintiffs failed to state a claim for relief under Section 2923.5 because the  
11 foreclosure sale had already occurred; (4) plaintiffs' claim under Sections 1632 and 1632.5 were  
12 not time-barred to the extent that plaintiffs' claims concern the 2009 loan modification, but were  
13 not pled with sufficient specificity; (5) plaintiffs' allegations of fraud were sufficiently pled and  
14 were not time-barred; (6) plaintiffs stated a claim for negligence where defendant went beyond its  
15 role as a lender and engaged in loan modification; and (7) plaintiffs' claim for a remedy of  
16 injunctive or declaratory relief could go forward. Plaintiffs were given 21 days to seek leave to  
17 file an amended complaint, and were instructed to append a proposed amended complaint to their  
18 motion and clearly explain how the proposed amendments to the complaint cure the deficiencies  
19 identified in that order.

20 Plaintiffs now move for leave to file an amended complaint. The proposed complaint is  
21 largely identical to the original, with changes limited to a few additional allegations and one new  
22 claim to set aside the trustee's foreclosure sale. The proposed complaint alleges the following six  
23 claims: (1) unfair competition under Section 17200, (2) violations of Sections 1632 and 1632.5,  
24 (3) common law fraud, (4) preliminary and permanent injunction and declaratory relief, (5)  
25 negligence, (6) and a claim to set aside trustee's sale. Plaintiffs do not seek to re-allege any  
26 claims that were dismissed without leave to amend. Plaintiffs' accompanying motion does not  
27 provide any explanation regarding how the proposed amendments cure the deficiencies found in  
28 the dismissal order.

1       Defendant Wells Fargo opposes the motion on the ground that the proposed amended  
2 complaint is futile. Plaintiffs' proposed amended claims and proposed new claim are examined  
3 below.

## ANALYSIS

5 Under FRCP 15(a), “leave to amend shall be freely given when justice so requires.  
6 However, the district court may exercise its discretion to deny leave to amend due to ‘undue  
7 delay, bad faith or dilatory motive on part of the movant, repeated failure to cure deficiencies by  
8 amendments previously allowed, undue prejudice to the opposing party . . . , [and] futility of  
9 amendment.’” *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892 (9th Cir. 2010) (quoting  
10 *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

## A. UNFAIR COMPETITION CLAIM.

12 Plaintiffs amended their unfair competition claim to state that “Plaintiffs further allege that  
13 the defendant, and each of them, violated all three prongs of this section by virtue of their  
14 fraudulent conduct alleged herein below under the common law fraud cause of action which the  
15 plaintiffs reallege and incorporate herein as though fully set forth.” Plaintiffs made no changes to  
16 the factual allegations and did not explain how the above addition cures the deficiencies in their  
17 original complaint.

18 Plaintiffs' proposed amended complaint, however, clarifies that their unfair competition  
19 claim is based squarely on the claim for common law fraud. A claim of common law fraud is  
20 actionable as an "unlawful" business practice under Section 17200. *See Boschma v. Home Loan*  
21 *Center, Inc.*, 198 Cal. App. 4<sup>th</sup> 230, 253. As the dismissal order found, plaintiffs have sufficiently  
22 stated a claim for common law fraud. Thus, as their unfair competition claim rises and falls with  
23 the underlying fraud claim, plaintiffs have stated a claim for relief for "unlawful" conduct within  
24 the meaning of Section 17200.

## **B. CIVIL CODE SECTIONS 1632 AND 1632.5.**

26 Plaintiffs added a section alleging that plaintiffs speak Spanish as their primary language  
27 and that defendant failed to provide them with a translation of the loan agreement. The sole  
28 allegation concerning defendant's failure to provide Spanish translation concerns the loan

1 modification agreement in 2009. As stated in the dismissal order, allegations relating to the loan  
2 modification in 2009 under this Section are not barred by the statute of limitations. Thus, a claim  
3 based on defendant's alleged failure to provide translations of any loan modification agreement or  
4 amendments to the loan agreement made in or after 2009 are not time-barred.

5 Plaintiffs' proposed amended complaint does not state with sufficient specificity whether  
6 their claim concerns the 2009 loan modification. Plaintiffs' motion for leave to amend is **DENIED**  
7 with respect to this claim. Plaintiffs may file an amended complaint that clarifies whether they  
8 seek relief for conduct in 2009 or after.

9 **C. CLAIM FOR SETTING ASIDE THE TRUSTEE'S SALE.**

10 Plaintiffs' proposed amended complaint includes an additional claim "to set aside trustee's  
11 sale." The proposed claim incorporates by reference paragraphs 1 through 16 and states "by  
12 virtue of the defendant's illegal conduct as alleged in each of the causes of action set forth in this  
13 complaint, plaintiffs allege that the Trustee's Deed Upon Sale should be set aside as a measure to  
14 right the wrong committed by the defendant against the plaintiffs herein." In their motion for  
15 leave to amend, plaintiffs argue that adding this new claim is justified because the trustee's sale  
16 occurred on April 9, 2012, after the filing of the initial complaint. Defendant, however, argues  
17 that plaintiffs have failed to plead any facts on which the trustee's sale may be set aside. For  
18 example, defendant points out that plaintiffs have not even alleged that a trustee's sale took place  
19 (although this is not contested). Plaintiffs must file a new amended complaint that meets the  
20 requirements to state a claim for relief, including allegations regarding the fact of the sale and  
21 tender, if applicable.

22 **CONCLUSION**

23 For the foregoing reasons, plaintiffs' motion for leave to file an amended complaint is  
24 **GRANTED IN PART AND DENIED IN PART.** Plaintiffs must file an amended complaint in  
25 conformity with the rulings herein by **NOON ON SEPTEMBER 24, 2012.** Plaintiffs need not seek  
26 leave to file this amended complaint. Defendant may file a motion to dismiss or strike within **10**  
27 **CALENDAR DAYS** thereafter. Plaintiffs' response is due within **FIVE CALENDAR DAYS** after the  
28 filing of defendant's motion. A hearing on defendant's motion will be scheduled on **OCTOBER**

1       **18, 2012.** If no motion to dismiss or strike is filed, defendants shall file an answer within **20**  
2       **CALENDAR DAYS** of the filing of plaintiff's amended complaint. The hearing on plaintiffs' motion  
3       for leave to amend scheduled for September 20 is **VACATED**.

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5       **IT IS SO ORDERED.**

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7       Dated: September 17, 2012.

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WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE

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